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U.S. DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

INDIAN TRADER REGULATIONS TRIBAL CONSULTATION

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Taken at
Holiday Inn Rushmore Plaza
Rapid City, South Dakota
March 9, 2017

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P R O C E E D I N G S

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MS. TANA FITZPATRICK: Good morning, everyone. My name is Tana Fitzpatrick, and I am the counselor to the Assistant Secretary of Indian Affairs from the Department of Interior.

Do you want to introduce yourself?

MR. JAMES PORTER: My name is Jim Porter. I'm an attorney with the Division of Indian Affairs, Office of the Solicitor.

MS. TANA FITZPATRICK: Thank you all for joining us here today for our tribal consultation on the ANPRM for the 25 CFR Part 140 Licensed Indian Traders.

The purpose of the consultation stems from our December 8th, 2016 published ANPRM on receiving input on whether to update the 25, the Part 140, the Licensed Indian Traders.

We published ANPRM as a direct response to comments and proposals received from tribes, and tribal organizations are requesting the department to revise that part. We are in the very early stages. We haven't drafted any responses because we want to first hear from tribes, and so we've been going throughout the country hosting these tribal

1 consultations to receive input on whether or not the
2 rule should be left as is, should it be repealed,
3 should it be omitted or what parts should be
4 amended. And if it should be revised, what should
5 those revisions look like.

6 So briefly the background on Part 140 is that
7 it governs trade occurring on Indian reservations.
8 It's based on lesser-known Indian trader statutes,
9 which the most recent revision to that statute was
10 in 1903, so those statutes themselves are very, very
11 old. Those specific statutes sought to protect
12 tribes from unlawful traders trading on the
13 reservations. So Part 140, the regulations,
14 currently envisions a framework where the BIA issues
15 licenses to any person wanting to conduct business
16 or do business on a reservation.

17 The Department recognizes that tribes fully
18 regulate businesses operating within their
19 boundaries, and so today we're looking at whether or
20 not Part 140 should be revised in order to modernize
21 the implementation of the Indian trader statutes in
22 a way that is consistent with the federal policies
23 of tribal self-determination and governance and
24 supports tribal business practices that currently
25 occur and also strengthen tribal economies across

1 the country.

2 As we all know, we're under an administration,
3 and we don't know what the specific priorities just
4 yet are for Indian Country under that
5 administration, under our current administration,
6 but we anticipate that they will align with the
7 President's priorities for economic development.

8 So today we have several handouts that are
9 outside, but the handouts include a specific list of
10 questions we'd like your input on. Those questions
11 are taken directly from the ANPRM that was
12 published. And briefly those questions address,
13 again, whether the part should be revised in full or
14 in part and why, current federal -- or what federal
15 involvement should be in business practices
16 occurring in Indian Country, how to make sure
17 traders in Indian Country are reputable and
18 accountable and what type of trade should be
19 included and who should be regulated.

20 The Department is also interested in learning
21 how tribes currently regulate trade occurring in
22 Indian Country and how the revisions to this
23 regulation could promote economic viability in
24 Indian Country and address taxation issues.

25 So we are currently accepting written comments

1 as well. The deadline for comments is April 10th.
2 And we are here today just to listen and get your
3 thoughts on how to modernize these regulations to
4 promote tribal self-determination and economic
5 development. And for any commenters, we ask that
6 you note your name for the court reporter. That's
7 it. So if anyone has any comments, feel free to --
8 I don't know if we even need to use our microphones,
9 but if not, we can just kind of have a discussion as
10 well.

11 So while we're waiting for any comments, I'll
12 just briefly go over the questions that we have out
13 there on our one pager and also in the ANPRM. The
14 first question is: Should the Federal Government
15 address trade occurring in Indian Country through an
16 updated 25 CFR Part 140 and why?

17 The second question is: Are there certain
18 components of the existing rule that should be kept?
19 And if so, why? And for instance where the
20 Department has issued licenses, should there be a
21 grandfathering clause for current valid licenses
22 that the Department has issued under Part 140.

23 Third: How can revisions to the existing rule
24 ensure that persons who conduct trade are reputable
25 and that there are mechanisms in place to address

1 traders who violate federal or tribal law?

2 Fourth: How do tribes currently regulate trade
3 in Indian Country and how might revisions to 25 CFR
4 Part 140 help tribes regulate trade in Indian
5 Country? And there we'd like specific information
6 and suggestions on how the Federal Government can
7 bolster those tribes that currently comprehensively
8 regulate trade, as well as those tribes that do not
9 presently do so.

10 Five: What types of trade should be regulated
11 and what type of trader should be subject to
12 regulation?

13 And six: How might revisions to the
14 regulations promote economic viability and
15 sustainability in Indian Country?

16 And the last question is: What services do
17 tribes currently provide to individuals or entities
18 doing business in Indian Country and what role do
19 tax revenues play in providing such services? And
20 what types of infrastructure do tribes currently
21 possess and what role do tax revenues play in
22 building and maintaining such infrastructure?

23 MS. DANI DAUGHERTY: This is Dani Daugherty
24 talking. Do you want NCAI to elaborate on what they
25 handed out?

1 MR. JAMES PORTER: That's fine with me.

2 MS. DANI DAUGHERTY: Put you on the spot.

3 MR. JAMES PORTER: Does NCAI want to elaborate
4 on what it's handed out?

5 MS. DANI DAUGHERTY: Exactly.

6 MR. JULIAN NAVA: I'm Julian Nava. I'm a
7 staff attorney with the National Congress of
8 American Indians. I would ask to go last. I know
9 that, you know, this forum is meant for tribal
10 leaders who work in the communities, so I'm just
11 here to provide support. We did provide a one-pager
12 which is our, I guess, perspective on what we've
13 been working on over the last few years, so ...

14 MR. GARY MARSHALL: My name is Gary Marshall.
15 I'm with the Standing Rock Sioux Tribe, Standing
16 Rock Tax Department. We have an individual coming,
17 and our nation has a position on that, an official
18 written position and I guess verbal position. So
19 that's the only thing, we're waiting for them to
20 come. They're on their way. Once they get here,
21 we'll start with our statements.

22 MR. JAMES PORTER: Thank you.

23 MS. TANA FITZPATRICK: Would you all be okay
24 with Julian providing his comments while we wait
25 from NCAI? Or does anyone else have some comments?

1 UNIDENTIFIED SPEAKER: For us that would be
2 fine because we are similar in what he's saying, you
3 know, obviously because we are dealing with some of
4 those same issues. Because we line two states,
5 North and South Dakota, so for us it's unique that
6 we have to deal with the State of South Dakota if
7 we're going to do any sales or any kind of tax
8 agreements, and then we also have to deal with North
9 Dakota on that because we align two states. So for
10 us what he's saying (unintelligible) for tribes to
11 do is something that's very important to us on
12 Standing Rock because we would not have to have this
13 little (unintelligible) to do this, you know,
14 ourselves. And that's what we're doing now, just
15 kind of (unintelligible). We have no choice because
16 we need to move forward in this. And hopefully that
17 will put us in a position that one day we would have
18 that federal authority to be able to go ahead and go
19 into our own, with federal authority, federal
20 statute that would say we can do the taxation.
21 Currently we do the business licensing on Standing
22 Rock. So we've been putting these things in place.
23 So I guess that's why we're waiting for the other
24 two. They have the official statement and have a
25 position paper on it.

1 MS. TANA FITZPATRICK: Okay, thank you.

2 MS. HEATHER DAWN THOMPSON: Good morning. My
3 name is Heather Dawn Thompson and I represent TEC,
4 the Tribal E-Commerce Coalition and the United
5 Tribes of North Dakota, which is the inter-tribal
6 association of the five tribes in North Dakota but
7 not obviously individually, not individual tribes.
8 And then I'm also here on behalf of the Fort Belknap
9 Tribe of Montana.

10 So I just wanted to put a little asterisk. I
11 think that a lot of my tribes and clients were not
12 sure if this was going to be proceeding under the
13 new administration and so perhaps haven't been as
14 engaged in the conversation but now that it seems
15 like it is moving forward are extremely interested.
16 So I didn't want sort of their lack of, you know,
17 presence here to be an indicator of their lack of
18 interest in this regulation. It could not be
19 further from the truth. By example, the five --
20 chairman of the five North Dakota tribes went to
21 D.C. last week and met with new representatives of
22 the administration, as well as the new leadership in
23 Congress. And while they didn't use the verbiage
24 "Indian Trader Statute," the double taxation, it was
25 the single most important issue, period, that they

1 raised in every single meeting with both the Senate,
2 the House and the Administration. They put forward
3 that this is, the double taxation issue and the
4 confusion and jurisdiction with state governments
5 they put forward as the single largest impediment to
6 economic development on the reservations.

7 And specifically what they had shared with the
8 new Trump tribal liaison was that they were hopeful
9 that Mr. Trump, President Trump would think bigger
10 about economic development and infrastructure in
11 Indian Country. And Chairman Fox from the MHA
12 Nation specifically said, you know, we are concerned
13 that the focus here is going to be on like throwing
14 us a bone for infrastructure, Here's, you know, a
15 new energy project or, Here's a new development
16 project of some sort, and it's going to miss the big
17 boat, the big picture, which is this conversation.
18 But it doesn't matter how many little infrastructure
19 or little economic development projects you give us,
20 if you don't fix the structure we're never going to
21 be able to help ourselves; we're never going to be
22 able to pull ourselves up by our boot straps.

23 And this was the conversation, exactly what
24 we're talking about today, that we are in constant
25 litigation with states. We are in constant

1 negotiation and litigation over taxes, over
2 regulation, over who says what.

3 And the entire point of the reservations, we
4 lost everything else, the entire point of the
5 reservations and particularly of trust land was that
6 it was for us, that this land is being saved in
7 trust for the Native communities, for the tribal
8 nations, for Native Americans as individuals, and
9 that's sort of the last passion of our ability to be
10 our own tribes, be our own nations and protect
11 ourselves. And as long as the states continue to
12 have this constant daily encroachment, we will never
13 ever be able to move forward.

14 And so it's incumbent upon -- I'm obviously
15 paraphrasing but this is essentially what he was
16 saying. It's incumbent upon the Federal Government
17 to do what is supposed to be designed and reserve
18 these trust lands, reserve these nations for tribal
19 nations and stop the state encroachments. So that
20 was from the MHA president who was serving as the
21 chair for the five tribal chairmen during these
22 conversations.

23 And MHA has actually prepared a four- or
24 five-page paper, you may have seen it already, on
25 double taxation. So that one doesn't directly

1 answer these questions line by line but is the
2 overall general conversation. And then -- and
3 again, I know I'm not going through the questions,
4 but I'm giving you sort of a background on the
5 perspective.

6 Then from the perspective of the Tribal
7 E-Commerce Coalition, so those are while not always
8 the most favored industry, an important one for a
9 lot of tribes. Those are the tribes that tend to
10 have online lending and are trying to expand their
11 expertise that they've developed in E-commerce in
12 this area into other areas for Indian Country.
13 Their vision is, particularly for the rural
14 land-based tribes, one of the best ways to do
15 economic development is on-line through E-commerce,
16 whether that would be selling arts and crafts,
17 whether that would be through tourism, through the
18 financial industries. And they have developed --
19 there's about 40 tribes that do online lending, and
20 they've developed some level of expertise in
21 E-commerce and how to set those up and they want to
22 expand them. There are several tribes in the Great
23 Plains Region, probably between five and ten that
24 are in this field.

25 So from their perspective, taking out sort of

1 the controversial aspects of this particular
2 industry, just the commerce perspective, they are in
3 constant litigation with the states over who has the
4 authority to regulate and tax commerce that is
5 emanating from the reservation. So we're hopeful
6 that in your regulations you will not only do
7 brick-and-mortar conversation but also E-commerce
8 conversation, because particularly for the rural
9 large land-based tribes, a lot of the tribes believe
10 that that's the future and the most effective way to
11 develop their economies.

12 So if we don't have control over regulating the
13 commerce that emanates electronically from the
14 reservation and the taxation of that, simply because
15 the nexus or the impetus is going off reservation to
16 sell, then that makes all of those businesses
17 useless.

18 So I wanted to really encourage you and request
19 that you are as aggressive in the regulatory scheme
20 for bricks and mortar and E-commerce based economic
21 development.

22 So those are just some basic thoughts that I
23 wanted to share with you this morning and to let you
24 know that all of those entities, you know, sent me
25 here and they were like, "Get them that

1 information." They're definitely going to be
2 responding. There's definitely going to be much
3 more detail in it.

4 Several of us are actually flying out for the
5 RES one on Monday. And we'll be much more
6 comprehensive in this, but the biggest thing I
7 wanted to share is to express how important this is
8 to the tribes, so all five tribes in North Dakota,
9 top priority, number one priority when we were in
10 D.C. last week., the tech coalition, so all of the
11 tribes that do E-commerce, and then the Fort Belknap
12 Tribe which is, you know, very close with now
13 Secretary Zinke, has been raising this issue with
14 him constantly.

15 And, you know, the biggest concern obviously is
16 that even though Congress is supposed to serve as
17 the federal oversight for Indian Country and did so
18 by initially passing these, this law, the trader
19 law, they tend to be more state-centric and forget
20 that they're not just representing their states but
21 they are now in a Constitutional role as
22 representatives of the Federal Constitution and the
23 Constitutional relationship federal to tribal.

24 And so we are super excited about the federal
25 regulatory process in this capacity as addressing

1 the initial goal of Congress, which is to make sure
2 that tribes have control and the Federal Government
3 has control over their own commerce, which is the
4 way it was designed from the beginning.

5 MS. TANA FITZPATRICK: Thank you for those
6 comments and we look forward to receiving the
7 comments from all the entities and tribes.

8 MS. A. GAY KINGMAN: I'm going to read into the
9 record our resolution. I am Gay Kingman, Executive
10 Director of the Great Plains Tribal Chairman's
11 Association.

12 What took you so long? We passed our
13 resolution on February 7th, 2014. And I'm glad that
14 we're getting to this now, but the Great Plains
15 Tribal Chairman's Association, which is 16 tribes in
16 the Great Plains Region, passed a resolution 2-7-14
17 to revise the Federal Indian Traders License
18 Regulations to promote and protect Indian commerce
19 and intertribal trade.

20 And this is long but I'm going to read it, and
21 I'll give it to you. The Great Plains Tribal
22 Chairman's Association is composed of the elected
23 chairs and presidents or their duly appointed
24 representatives of the 16 sovereign Indian tribes
25 and nations recognized by treaties with the United

1 States that are within the Great Plains Region of
2 the Bureau of Indian Affairs.

3 The Great Plains Tribal Chairman's Association
4 was formed to promote the common interests of the
5 sovereign tribes and nations and their members of
6 the Great Plains Region which comprises the states
7 of North Dakota, South Dakota and Nebraska.

8 Whereas, before the United States, Indian
9 tribes were sovereign independent nations.

10 Whereas, in the treaty and supremacy clause,
11 the Constitution of the United States acknowledges
12 Indian nations and tribes as sovereigns, with
13 self-governing authority over our citizens and
14 territory.

15 And whereas, in the commerce clause, the
16 Constitution authorizes Congress to regulate
17 commerce with the Indian tribes.

18 And whereas, the Great Plains Tribal Chairman's
19 Association recognizes its responsibility to act to
20 advance the goals of the tribes and their members
21 and to promote improvements to the health, safety,
22 welfare, education, economic development and
23 preservation of the spiritual, cultural and natural
24 resources of its member tribes and nations.

25 And whereas, the United States has obligated

1 itself both through treaties entered into with the
2 sovereign tribes and nations of the Great Plains
3 Region and through its own federal statutes, such as
4 the Snyder Act of 1921 as amended, the Indian
5 Self-Determination Act of 1976 as amended, and the
6 Indian Healthcare Improvement Act of 1976 as
7 amended.

8 And whereas, Indian tribes are governments that
9 pre-date the United States, and through the Indian
10 commerce, treaty and apportionment clauses and the
11 14th Amendment, the United States recognizes the
12 status of Indian tribes as sovereigns and the status
13 of American Indians as tribal citizens.

14 And whereas, the United States entered into the
15 1851 Fort Laramie Treaty and the Treaty of 1868 with
16 our Lakota Indian nations and other tribes to
17 promote peace, friendship and commerce, with the
18 1851 Treaty recognizing the original territory.

19 And whereas, the United States destroyed
20 traditional tribal economies by killing the buffalo
21 herds and taking Indian lands.

22 And whereas, today Indian nations and tribes
23 are working to create jobs, revitalize tribal
24 economies, promote strong tribal governments and
25 economic self-sufficiency.

1 And whereas, it is the policy of the United
2 States to promote Indian self-determination,
3 including the overriding goals of promoting tribal
4 economic development and self-sufficiency among
5 Indian nations and tribes.

6 And whereas, the integrity of Indian commerce
7 and trade is critical to the economic development of
8 Indian nations and tribes, and intertribal trade is
9 a fundamental aspect of tribal economic development.

10 And whereas, since 1776 the United States has
11 regulated Indian traders engaging in commerce with
12 Indian nations and tribes, and Congress has
13 maintained Federal Indian Traders Statutes since
14 then.

15 And whereas, under the Indian
16 Self-Determination Policy, the President and
17 Congress have determined the Indian nations and
18 tribes should perform government duties and
19 responsibilities on Indian lands and that the
20 Federal Government must contract with Indian nations
21 and tribes and delegate authority to perform
22 historical federal functions.

23 And whereas, the Supreme Court has held that
24 under the Indian self-determination policy and to
25 promote tribal self-government, the comprehensive

1 Federal Indian Traders License statutes and
2 regulations preempt state taxation and regulation
3 that would interfere with tribal economic
4 development in Warren Trading Post (1965) and
5 Central Arizona Machinery (1980).

6 And whereas, the Supreme Court has held that
7 the federal and tribal government interests in
8 Indian self-determination, economic development and
9 tribal self-sufficiency preempt state taxation and
10 regulation of tribal economic ventures that generate
11 reservation value, New Mexico versus Mescalero
12 Apache Tribe (1984) and California versus Cabazon
13 Tribe Band of Mission Indians (1987).

14 And now therefore be it resolved that pursuant
15 to the Indian self-determination policy, the
16 Secretary should revise the Federal Indian Traders
17 License regulations to provide for contracts with
18 and delegations of authority to Indian nations and
19 tribes to implement the Federal Indian Traders
20 License regulations to promote and protect Indian
21 commerce and intertribal trade.

22 And be it further resolved that Indian nations
23 and tribes should receive contracts to perform the
24 background checks, reviews and develop Federal
25 Traders License applications to present to the

1 Secretary for issuance.

2 And be it further resolved that the Secretary
3 should update the Federal Indian Traders License
4 regulations to require those engaged in Indian
5 commerce to comply with reasonable tribal business
6 regulatory, consumer protection and tax measures.

7 And be it further resolved that in the revised
8 regulations, the Secretary should provide that the
9 policy of the United States is to promote Indian
10 self-determination, economic development, Indian
11 commerce and intertribal trade and economic
12 self-sufficiency.

13 Be it further resolved that it is the policy of
14 the United States to remove all the barriers to
15 Indian economic development, Indian commerce and
16 intertribal trade and economic self-sufficiency.

17 And be it finally resolved that the Secretary
18 should expressly provide that in furtherance of
19 these policies, state regulations and taxation of
20 Indian commerce and intertribal trade are preempted
21 by federal law and policy and tribal government
22 interests in self-government, economic development
23 and self-sufficiency.

24 Be it finally resolved that this resolution
25 shall be the policy of the Great Plains Tribal

1 Chairman's Association.

2 And it was certified and signed by Chairman Tex
3 Hall at the time. That was back in 2014. And we
4 will probably update this for the, before the 10th
5 deadline. But we have requested these policies be
6 updated back then, and I'm glad we're getting to it
7 now.

8 Thank you.

9 MS. TANA FITZPATRICK: Thank you.

10 MR. GARY MARSHALL: Quick question: When you
11 guys have been traveling to Indian Country, has the
12 attendance been larger than this, or how has it been
13 so far?

14 MS. TANA FITZPATRICK: It's been -- it's kind
15 of ebbed and flowed. When we were at NCIA mid-year,
16 that room was packed and standing room only. Well,
17 I'm not saying it was only for this because there
18 was another presentation, too, but there was a lot
19 of people in there. I anticipate RES will have
20 hopefully a lot of people since, you know, that's
21 kind of what that conference is about.

22 I was at Billings on Tuesday and there was only
23 two people that came. And a couple of other
24 locations had about that amount of people. But Jim
25 and I were also at Swinomish in Washington and there

1 was about 20 people that came. So it's been kind of
2 back and forth.

3 MR. GARY MARSHALL: I guess from myself
4 personally, I don't see it's a lack of people
5 wanting to do this. It's just sometimes people
6 don't think of the possibility about how it would
7 really happen. We can take a look at the 2010
8 Tribal Law & Order Act which was probably something
9 that everybody said we could never change and we see
10 that law changed now.

11 We've got Director (unintelligible) up there in
12 Bismarck with some discussion about Standing Rock
13 again, so I guess that was for us saying that yes,
14 we would like to see these changes we've been
15 talking about for a long time. Obviously we at
16 Standing Rock know that our infrastructure is
17 overtaxed, overburdened because of the simple fact
18 that we don't have a tax scheme that allows us to
19 tax everybody. And with that, you know, we fall
20 short (unintelligible).

21 We have a problem with alcohol sales. In the
22 state law in North Dakota and South Dakota it's
23 called an alcohol distributor's tax. So it's off
24 the reservation before it comes in. So once it
25 arrives here we have a problem but we have no way of

1 solving it, even though we are the ones purchasing
2 the product.

3 So these are issues that other tribes I know
4 have faced, and we've had discussions with them at
5 various times about how this law needs to change
6 because of the fact that we are facing those
7 burdens. If it's a call for law enforcement, it's
8 usually our Standing Rock Law Enforcement who shows
9 up. If it's a call for an ambulance, it's our
10 ambulance. We have no non-Indian ambulances serving
11 Standing Rock. We have one sheriff in Sioux County
12 in North Dakota, and we have two or three in South
13 Dakota. But the majority of the time it's the BIA
14 responding; it's our EPA that's responding to
15 environmental concerns; you know, it's our water
16 personnel responding because they have the MR&I
17 systems, they have the sanitation system, the
18 lagoons, those are all managed by tribes in
19 cooperation with the IHS. So it's always our burden
20 in our structure.

21 And the good thing about Standing Rock, we have
22 many non-Indians, but when we did enter into
23 agreement for a brief period with the State of North
24 Dakota, who supported -- the county commissioners,
25 you know, all supported this because they understood

1 that, you know, they relied upon the Standing Rock
2 Sioux Tribe to provide those services. Their kids
3 are attending, you know, Standing Rock schools which
4 are funded by the BIA and they go to the IHS. They
5 use the bus system. They use the roads.

6 During the storms -- (unintelligible). He's
7 also on tribal council but he's also a member of the
8 (unintelligible). I'm thankful and many people were
9 thankful for the fact that he came out. And he
10 isn't with the road but he does work and understand
11 roads. So he got out there. A lot of times you'll
12 hear that from the people at Standing Rock
13 (unintelligible) thank God we have our own roads
14 because it's really not maintained by the state.
15 It's a small percentage. So it relies upon ours.

16 And we had a whole month of terrible storms,
17 constant storms. The only way I could get through
18 that was by bulldozer, and (unintelligible). That's
19 the same way for many of us. We had to rely upon
20 them. Do we have the money? We need equipment.
21 And if we had that authority to be able to tax
22 straight across from all the businesses, that would
23 be great.

24 I think there was a discussion about the
25 internet, and somebody was saying something, "How

1 could the tribes do this?" An example, we at
2 Standing Rock talked about this with the State of
3 North Dakota, meeting with them and they passed
4 legislation that would support a joint agreement.
5 And the physical note that came out on the Senate
6 and House force was that it was going to cost
7 \$1.5 million to create that because of the software,
8 which was the agreement between (unintelligible),
9 which was about 24 states. At that time Standing
10 Rock did step up and say, "We have the solution to
11 what there is -- your problem. There is no
12 problem." So in that discussion we came up with an
13 identifier, which instead of having just a straight
14 across tax in the State of North Dakota,
15 (unintelligible) including Standing Rock they came
16 up with 5.25. That discussion (unintelligible) it
17 was explained that in that compact between those
18 states that worked that way, this would be the
19 identifier for Standing Rock. And had we not done
20 that we would have never gone down that path. And
21 right now we have 15 businesses (unintelligible)
22 have under our jurisdiction because the other ones
23 would be (unintelligible).

24 After we finally got the first report showing
25 that we had approximately 285, 89- I think it was

1 businesses reporting from Amazon down, so you can
2 see the numbers. You can subtract that on the
3 internet, sales number coming inbound that we never
4 received for many, many years, and that means that
5 we didn't get that income. We couldn't build a pool
6 for our kids. We couldn't build, you know, our
7 facilities for our elderly.

8 So these are the things I think that most
9 tribes are looking for is everything that's not
10 coming to us even though it's being collected. And
11 alcohol is one of them. Telecommunications is
12 another one that doesn't come to us but it's
13 collected. You know, it's the same way on Internet
14 sales, unless we have an agreement or can come up
15 with something, how would we get that revenue to
16 come back to us? Because it does affect us. It
17 does affect the tribe. And being able to strengthen
18 tribal governments' positions, (unintelligible) what
19 they can do with those, they need those resources
20 available to them.

21 And I know -- I think we are kind of looking
22 the same way as NCAI, you know, give us that federal
23 authority, give us that federal preemption so that
24 there's no question about the simple fact do we have
25 the right to regulate commerce in Indian Country, do

1 we have the right to, you know, have our own tax
2 code in place and be able to assert it fully across
3 all of the businesses that are on Standing Rock, as
4 well as those who are providing Internet sales to
5 Standing Rock.

6 We know we can do it. We've showed that we can
7 do it. So now we're trying to do it, you know, but
8 we sure need to. It would be nice to have this by
9 federal law and preemption.

10 Currently at Standing Rock we do have a
11 business licensing division within the tax
12 department in our codes that does licensing
13 businesses. We did have, you know, and had some
14 that (unintelligible) as we want to regulate and
15 ensure commerce is done, you know, favorably to
16 those in Indian Country and Standing Rock.

17 So when these things aren't happening
18 throughout and people are (unintelligible), we say
19 further reason is we want to regulate and make sure
20 commerce is done, you know, favorably to those in
21 Indian Country and Standing Rock. So these things
22 are happening throughout and people that I have
23 worked with and dealt with.

24 When she mentioned MHA, it's the same way, they
25 have the problem. And we have other tribes with the

1 same problem. I guess when you talk to tribes in
2 our (unintelligible) they say, "Wait, wait, actually
3 being taxed prior to the alcohol products received?"
4 I said, "Yes, they are." We don't have, you know,
5 facilities. We don't have the programs. So by
6 federal authority give the tribes that authority so
7 that we can collect that.

8 And, you know, it's no different than any other
9 federal (unintelligible). You know, if we have that
10 imposed on there and (unintelligible) before it came
11 to the state, then we know we got that money. It's
12 not about permission. We know the sales that happen
13 on reservations or near reservations are really high
14 and have those problems, but the only way we can
15 address it is we have the revenue. We're paying for
16 it but we're not receiving that tax money.

17 So I guess the importance for us up there, it's
18 really important for someone to give us that federal
19 authority to be able to, one, regulate commerce
20 businesses by allowing us to be the ones that do
21 license our businesses under our code, for us also
22 to be able to provide taxation to all business that
23 are conducted on and in, those would be the internet
24 sales. And obviously we had said we do need that
25 ability to be able to do the alcohol that's

1 (unintelligible) and bring it back in there under
2 federal authority so that we would be the ones that
3 would be able to impose that tax on it, we would be
4 able to address those problems.

5 Obviously we're very good at taking a look at
6 what's on the outside. We'd love to have swimming
7 pools for our kids. We'd love to have better
8 facilities for our kids and education and law
9 enforcement. All of those things that we currently
10 do serve in those communities that, you know, are on
11 Standing Rock, they benefit from the tribe doing
12 these things. So now that's what we're hoping is
13 that if we can get that additional revenue, that's
14 what we'd like to do badly.

15 And I think this has been a great opportunity
16 for us. I know it's been a long time coming because
17 I did work with Chairman Hall when he was at MHA on
18 different other issues, and this is an issue that's
19 always been very important to us and continues. I
20 think most of us had hoped it had come earlier than
21 this, but it's great to see that it's still
22 happening and I hope it does happen for us.

23 MS. HEATHER DAWN THOMPSON: So I was just
24 re-reading through some of the questions that you
25 had read this morning and I wanted to give a couple

1 specifics to each -- to some of these questions.

2 With regard to number 3, How can you ensure
3 that there are good mechanisms in place for doing
4 business with reputable individuals, and, you know,
5 I just wanted to reiterate what Gay and Standing
6 Rock had said. You know, I think the hope overall
7 is that there will be federal preemption but
8 deference to tribes for implementation, however that
9 structure might look like, whether it be through a
10 638 type of thing or maybe something less formal
11 like how state block grants works, you know, maybe
12 like a tribal block grant where it just
13 automatically goes to the tribes if they have the
14 capacity and (unintelligible) to do their own
15 regulation.

16 But I can only speak for my clients. The one
17 thing I do think that would be super helpful, at
18 least in the interim, that the Federal Government
19 did sort of assume a stronger role in is the
20 background checks on people we do business with.
21 It's very expensive and a lot of the tribes that are
22 just getting started can't always afford that. And
23 I don't necessarily mean like the person you're
24 buying water from or the Coca-Cola dealer but like
25 the big investors and the big partners that you're

1 trying to do some of these big projects with. Some
2 of the things we have seen have been really
3 sophisticated information that we don't necessarily
4 have access to or the capacity -- like different
5 lawsuits that have been filed in different
6 jurisdictions that might not show up or, you know,
7 criminal histories that we may not necessarily have
8 the access to. So I think that that is actually a
9 role that is outlined in the statute and that would
10 be really, really helpful. And I don't mean like
11 every single person has to have a background check,
12 but when the tribes need to, being able to turn to
13 the BIA to request that would be super helpful.

14 Regarding number four, How do tribes currently
15 regulate their trade, and this goes into the
16 category of we're hoping that you'll figure out a
17 good structure to defer to tribes to regulate when
18 they're ready and if they opt into that.

19 Obviously a lot of tribes have their own
20 regulations in place; they have their own statutory
21 structures in place to regulate not only commerce as
22 a whole but specific areas of commerce, whether it
23 be (unintelligible) or online lending or whatnot,
24 areas that need specific regulation have that in
25 place.

1 But there's two components to that that I
2 wanted to make sure were acknowledged or at least
3 made room for in the regulations. One is
4 intertribal oversight. So what I'm hopeful is that
5 the regulation won't just say only this tribe can do
6 this. Because for example a lot of tribes might not
7 have the capacity individually but other tribes or
8 sister tribes might and they've been contracting
9 with them through governmental MOUs.

10 So for example the Rosebud Sioux Tribe has a
11 really robust oversight for online lending. And so
12 just like the Gaming Commission, they have a
13 Commercial Lending Commission. And so rather than
14 repeat that model at other tribes, when there's
15 limited resources a lot of the other tribes have an
16 intergovernmental MOU and Rosebud serves as their
17 governmental regulatory body. So I want to make
18 sure that any regulations take into consideration
19 intertribal regulation, intertribal working groups,
20 intertribal commerce. So that's one part of it.

21 The second part of it is contracting out for
22 those services. And this is an area of constant
23 litigation and one that has, we've been losing in
24 the courts, where the states say, "Okay, you're no
25 longer a tribal business; you're no longer a tribal

1 regulation; you're no longer a tribal entity because
2 you hired a non-tribal person to do this for you."
3 And this is insanity. I mean, could you imagine if
4 a state government lost its (unintelligible) or lost
5 its ability to regulate because they hired a private
6 contractor? I mean, the entire Federal Government
7 is run on private contractors and it doesn't change
8 the governmental nature of the purpose, the
9 regulation, the business, et cetera.

10 So I can't emphasize the importance of this
11 enough. There has to be something in these
12 regulations that say, you know, If this is a tribal
13 decision, if this is a tribal hiring, if this is a
14 tribal -- it doesn't matter if you're an enrolled
15 member or not. I see this in litigation all the
16 time, "Oh, this person is not an enrolled member of
17 the tribe and therefore this isn't a tribal entity,"
18 which is craziness.

19 So whether or not they're all on the
20 reservation, whether or not everybody is a tribal
21 member is not the relevant factor; that the trade
22 comes from the tribal sovereign decision to hire
23 this business, to hire this person. They might be
24 based in Los Angeles because that's the most
25 efficient way to run this component of the business

1 for the tribe. But making sure that this regulation
2 emanates not only from the location of the
3 reservation but from the decision of the tribe,
4 regardless of where that regulation or that entity
5 happens to be, just like with any other government.

6 Five: What types of trade should be regulated?
7 And I think most tribes would say everything. Like
8 we just said, it shouldn't be trade-specific based.
9 It should be location based and tribal based, so
10 everything obviously on the reservation and
11 everything that comes from the tribe, whether it be
12 located on or off the reservation, and not make it
13 item specific. And that comes into place not only
14 from an E-commerce standpoint but from the
15 standpoint that we just talked about, you might have
16 certain businesses that you contract with off the
17 reservation or you might actually locate tribal
18 offices off the reservation. For example, Oglala
19 has several offices here in Rapid City that are
20 governmental offices, and they have several offices
21 that are commerce-based offices.

22 I think a basic recognition that tribes
23 currently at least don't have a tax base and so
24 their governmental revenue comes from participation
25 in the private marketplace, and that in no way

1 diminishes the fact that this is still a
2 governmental activity. This is creating
3 governmental revenue. But the way that it has been
4 designed that is the only way or one of the primary
5 ways that tribes can get their governmental revenue.
6 And that doesn't diminish the governmental status
7 just because they're participating in a private
8 marketplace.

9 And then as Standing Rock was sort of talking
10 in more depth about the tax portion of it, there's
11 of course two aspects of this, tax and regulation.
12 From a tax standpoint, as you know the states get
13 really creative. And I think that the regulation
14 has to be very encompassing, because they get
15 creative about the impetus of tax and where that
16 impetus of tax is they're going to get us somehow.
17 So like as soon as it leaves the reservation they'll
18 think, Oh, okay, now it's off the reservation, we've
19 got you. We're going to put, you know, a tariff on
20 anything that comes off the reservation of
21 50 percent. So you think we can't tax you? I mean,
22 I'm not making this up. This will happen. And so
23 this regulation has to essentially say we have
24 federal preemption (phonetic), we have federal
25 preemption over trade going into, trade coming off

1 and trade going through the reservation. Otherwise
2 they're just going to get cute and just change the
3 impetus of tax and this is going to be a totally
4 useless endeavor.

5 And the same thing goes for regulation. You
6 know, commerce that is emanating from the
7 reservation, particularly that is governmentally
8 owned falls under the regulation of that sovereign
9 entity.

10 I think those are my main points is, you know,
11 making sure that this is encompassing enough so that
12 the state can't get cute. From both a regulatory
13 and a tax standpoint, this has got to cover
14 everything that is from the land base and not just
15 whether it's on trust or fee land because then we
16 get into the same cute little game all the time.
17 It's got to be within the four corners of the
18 reservation. And it's got to be everything that's
19 on the reservation, everything that emanates from
20 the reservation that goes off the reservation and
21 everything that is tribal governmentally owned or
22 controlled.

23 Like I said, because any one of the cases
24 recently you can pull up and you can see the court
25 and the state going through the arguments, "Not

1 Native, off the reservation, contracted out." The
2 impetus of tax, like the (unintelligible) petroleum
3 issue that (unintelligible) is going with, those oil
4 pipelines are on trust land on the reservation but
5 because it's going off the reservation the state is
6 taxing them. So unless we are fully all
7 encompassing they're just going to get cute, change
8 the impetus of tax, decide if you're Indian or
9 non-Indian as a variable, which is ridiculous, if
10 you're contracted out or in-house.

11 So those will be in our comments, but we're
12 really hopeful that you have a very broad vision of
13 what this would have to look like to actually fix
14 the trading and the commerce in Indian Country.

15 MS. TANA FITZPATRICK: Thank you.

16 MS. A. GAY KINGMAN: This is Gay Kingman.

17 I just wanted to respond to a couple points
18 Heather mentioned. But just as the tribal
19 government sets up their codes, their business codes
20 and everything, there has to be some sort of
21 security and protection for the tribal government in
22 the way that -- we all know and have heard stories
23 about fake people or even individuals that have
24 claimed to be government. The sovereignty rests
25 with the tribe and the responsibility rests with the

1 tribe. But we've had, and the common word that's
2 used since President Trump came in is alternative
3 people that have set up fake businesses but they
4 claim to be under the tribe. So there's got to be
5 some sort of I guess protection against these fake
6 businesses that claim tribal sovereignty and they
7 don't have it.

8 And then it also leads to our tribal courts, we
9 see our tribal courts going now more and more into
10 what we call blue collar crime considerations. It
11 used to be that we didn't have that but today we do.
12 So somehow our tribal courts need to be involved in
13 whatever commerce or tax or whatever so our tribal
14 courts are equipped to deal with these new areas.

15 I know on Cheyenne River we had a case that
16 came up, and I think the court handled it very well.
17 But our courts really need to be equipped with
18 better services on this because if we're going into
19 taxation and all of these areas, our courts also
20 need to be improved.

21 MS. TANA FITZPATRICK: Thank you.

22 MR. RANDALL WHITE: My name is Randall White.
23 I'm under the North Dakota Tax Commission. Also I
24 served as a former councilman for (unintelligible)
25 North Dakota. Also had a large term.

1 I guess the concern I have is for many of the
2 years that I've been coming here giving testimony to
3 the issues, a lot of times North and South Dakota
4 and plus also federal agencies never return with
5 answers. I guess to me a lot of times they put it
6 on a shelf and we never hear back from you guys. So
7 I hope today that we hear (unintelligible) tribal
8 chairman's (unintelligible), two thousand I think
9 fourteen. I mean, we're waiting for answers. So I
10 hope that we don't have to wait long. And I hope
11 you guys are pursuing -- North and South Dakota a
12 lot of times they put it on a shelf and it's like
13 deaf ears. So I just wanted to share that concern
14 because for 20 years I've been going to these. It's
15 kind of like everybody sits it on a shelf and we
16 never hear back from you guys. So that's one
17 concern I have from Standing Rock. My name is
18 Randall White, Sr.

19 So I hope we get our answers soon and not have
20 to wait many years. Because I know I testified in
21 education for 11 years and that stood on a shelf for
22 11 years. And I think a lot of our kids outgrow
23 education. So that's a concern I have.

24 So I just wanted to share those concerns that
25 come from Standing Rock. Thank you.

1 MS. TANA FITZPATRICK: Thank you.

2 MR. JAMES PORTER: Thank you.

3 MR. GARY MARSHALL: Gary Marshall, Standing
4 Rock.

5 I think some of the comments that were made are
6 something that we've heard for many years and many
7 decades throughout Indian Country as I travel around
8 working with different groups. And it's really nice
9 to see in this discussion with so many people,
10 including meeting with different people within
11 Interior, in 2009 we were out there.

12 (Unintelligible).

13 Can't hear me?

14 THE COURT REPORTER: It is very hard to
15 understand.

16 MR. GARY MARSHALL: So all of these discussions
17 come in different areas, like tribal law and order
18 and discussion of what she's mentioning on some of
19 the things on dual taxation. I think that's one of
20 the reasons that we hear throughout Indian Country,
21 you know, including when you have oil or coal
22 discovery, mining going on, transportation, is the
23 fact that you see certain laws applying.

24 (Unintelligible) petroleum is one that's used up in
25 our area for those who have oil production saying

1 that they have that right to impose it.

2 So you have the tribes who do say, Yes, give us
3 that federal preemption, give us that federal
4 authority so that we know that that is a supremacy
5 clause that would say (unintelligible) Constitution
6 that we have that right to be able to do the
7 taxation ourselves without question, without the
8 states coming in.

9 A good example for us on Standing Rock is that
10 we were in a tax agreement with the State of North
11 Dakota. Part of the thing that the State of North
12 Dakota can do by (unintelligible) authority is they
13 can exempt out entities within a tribe, which they
14 do and they have. So they don't pay a tax because
15 they feel that they don't have to.

16 We on Standing Rock, by law we exempt our
17 entities which includes gaming facilities. The
18 problem with that is the State says, "The State
19 don't recognize it," so they want to get into
20 argument. So that kind of prevented us from
21 continuing, so we're now doing it by ourselves. So
22 we're going to be dealing with these businesses who
23 are Indian owned within our jurisdiction but we'd
24 like to do it straight across. And that's part of
25 the problem that it has, without the Internet sales

1 that are coming in, the taxation by default in the
2 system that they have reporting on those 24 states
3 automatically go to the State of North Dakota now.
4 So for us to be able to have a federal preemption by
5 Internet sales for those jurisdictions like in
6 Standing Rock, that would be great. We've seen that
7 (unintelligible). Those revenues do drop down from
8 what we were getting over the time while we were in
9 agreement to about a third of what they're getting
10 now because of the simple fact because obviously the
11 money that has been mentioned, tribal courts, our
12 tribal courts have been burdened recently. It's
13 been very tough for us to create new programs
14 because we don't have that revenue. And we know
15 that the money is there and we should be getting it.

16 We are the one that does face these daily
17 impacts in Indian Country because of the laws
18 currently as they are. So that's why we're hoping
19 that by federal preemption those tribes who want to
20 can choose to, or if they want to participate in
21 state agreements, they can participate in state
22 agreements. But without that for us at Standing
23 Rock it's very tough for us to be able to regulate.

24 We try to push these issues. And I would hope
25 that if we get that, that would be one of the areas

1 that we would identify so that we can put that money
2 back into the school, back into law enforcement,
3 back into programs that would help our tribal courts
4 or housing. We don't have housing as much as we
5 need. We don't have that kind of money. So we
6 would hope that taxation for us, as long as
7 (unintelligible) for businesses, would give us that
8 ability to do it. Federal preemption, that would be
9 something that would be great for Indian Country for
10 those tribes who chose and wanted to do it, or those
11 that felt they wanted to stay in the state
12 agreement, then they could do that. But giving us
13 the ability to make those choices are very
14 important, as well as the federal law that would
15 support that ability for us to do it.

16 MR. JULIAN NAVA: Okay, I guess it will be my
17 turn. Good morning. My name is Julian Nava. I'm a
18 staff attorney with the National Congress of
19 American Indians.

20 And I just wanted to thank the tribal leaders
21 and everyone here on behalf of the local tribes for
22 attending this important consultation. And I
23 believe that I've met a few of you, but if I haven't
24 I look forward to meeting you here today or
25 throughout our endeavors in Indian Country.

1 But thanks so much to the Department for taking
2 up this critically important issue. And it's been
3 an issue that NCAI has been working on for a couple
4 years now. And I just wanted to provide a couple of
5 highlights about our focus or our priorities in the
6 general sense about how these regulations need to be
7 updated.

8 So according to a couple of the notes that I
9 have, you know, and like everyone has said, these
10 regulations haven't been updated since I believe
11 1903. And the last attempt was made during the
12 1960s. And even in the papers that we were handed
13 out today, Part 140 has not been updated since 1965
14 and largely reflects the policies that ignore tribal
15 self-determination and the growth of tribal
16 economies, and so I think that's where obviously our
17 focus is. And these statutes provide a broad
18 authority regarding Indian trader regulations on
19 reservation land, and so it's our consensus that
20 these definitely need to be updated.

21 And as part of our proposal, and we'll be
22 providing comments before April 10th, but as part of
23 our proposal it works in three components or three
24 large sections that we believe are important in
25 dealing with these issues.

1 And first, the licensing function should be
2 delegated to tribal governments. Tribes are far
3 more capable of handling local business licensing on
4 tribal lands. And it is very important to have a
5 business licensing structure that can promote local
6 businesses and also deal with unscrupulous or
7 fraudulent business operators, like has already been
8 mentioned today, who should be prevented from
9 preying on consumers. For tribes who may wish to
10 continue to use federal licensing, they should be
11 permitted to obviously have that option.

12 The second component, and this was also
13 mentioned, is that there should be a presumption
14 that tribal courts have jurisdiction over all
15 parties that conduct business on the reservation.
16 Tribes don't intend for this to apply to the average
17 consumer who comes to the reservation to buy gas at
18 a tribal gas station, but what it is intended for is
19 licensed businesses operating businesses on the
20 reservation. And we saw this problem last year in
21 the Dollar General Supreme Court Case in which the
22 Supreme Court could not decide if a tribal court
23 should have jurisdiction when a store manager
24 sexually assaulted a young tribal member working as
25 an intern there.

1 A clear presumption of tribal court
2 jurisdiction in these regulations would enable
3 tribes to protect their citizens. This should be
4 easily done as there is already a provision for the
5 consent to jurisdiction under the current
6 regulations for both the Hopi and the Zuni tribes.
7 And in there it's regarding double taxation.

8 It is important to note that our proposal is
9 limited to businesses on tribal trust lands. We do
10 not intend to try to regulate or tax business
11 transactions between non-Indians on non-Indian fee
12 land. The law certainly doesn't support it and in
13 practice we don't believe it would work. But we do
14 intend to address or want to address the problem of
15 dual taxation on tribal lands. When the state or
16 local government is taxing the transaction on tribal
17 lands, that prevents tribes from collecting its own
18 taxes.

19 State governments provide few services on
20 Indian reservations but they impose taxes on
21 severance of natural resources, retail sales and
22 increasingly on property such as the wind generation
23 facilities.

24 Tribal governments face a losing proposition
25 when forced to collect state taxes. If tribes

1 impose a state government tax, then the resulting
2 dual taxation drives businesses away or tribes
3 collect no taxes and suffer inadequate roads,
4 schools, police, courts and healthcare.

5 And to add insult to injury, reservation
6 economies are funding millions of tax dollars into
7 treasures of state and local governments who spend
8 those funds outside of Indian Country. This dilemma
9 is fundamentally unfair to tribal governments,
10 undermines the Constitution's promise of respect for
11 tribal sovereignty and keeps Indian reservations the
12 most underserved communities in the nation.

13 As I previously stated, NCAI will be providing
14 comments. And as an organization and working with
15 tribal governments throughout the country, as well
16 as the administration, we stand ready to work with
17 you all in developing a regulatory structure that
18 will benefit everyone. We are still very early in
19 the process, as we all know, but we think it is
20 worthwhile to continue to move this process forward
21 and start drafting new and updated regulations.

22 So on behalf of the National Congress of
23 American Indians, I want to thank you all for being
24 here and especially the Department for taking up
25 consideration of these new regulations.

1 Thank you.

2 MS. TANA FITZPATRICK: Thank you.

3 MS. HEATHER DAWN THOMPSON: I just wanted to
4 add one additional detail in there. When you're
5 choosing the language to refer to tribes, something
6 to keep in mind, and we want to make sure that it
7 includes, because this is another area of
8 litigation, subsidiary entities. So a lot of times
9 when you see regulations and statutes, it's very
10 comprehensive when it comes to state governments,
11 you know that it covers counties, you know that it
12 covers local governments, you know that it covers
13 the electric company owned by the state, but a lot
14 of regulations don't include that for tribes and so
15 it's always a difficulty.

16 There are both -- you know, there are both
17 subsidiary entities and subsidiary governments. And
18 what I mean by that is subsidiary entities, we all
19 know a lot of tribes have tribal corporations, and
20 sometimes the language is not written so that the
21 non-tribal people understand that tribal
22 corporations, if they're wholly owned by the tribe,
23 still count as a tribal entity, as well as tribal
24 offices, you know, the office of -- the tax office,
25 the property office. So making sure that tribal

1 corporations as well as tribal governmental offices
2 are included in definitions.

3 And then in addition, many tribes are actually
4 moving towards more localized governance structures
5 and more localized economic development structures.
6 So for example the Navajo Nation has chapters, and
7 they have devolved chapters the ability to not only
8 govern themselves locally but also engage in
9 economic development. So it would be the equivalent
10 of Oglala has a similar structure. Tulalip has
11 local cities. Oglala has districts and community
12 governments and they have devolved to them the
13 ability to own their own tribal corporations as
14 well. And I think Standing Rock is starting to have
15 these conversations, too, right? Yeah, they have
16 the districts and they're starting to have these
17 conversations as well.

18 So that is a really difficult issue, too. So
19 making sure that it includes that so that the Navajo
20 chapters aren't like constantly litigating. If the
21 Navajo Nation has devolved and given them both
22 governance and economic development authority, that
23 needs to be included in the definition. Any
24 essentially just like a state, any sort of local
25 subsidiaries, they're not going to be called

1 counties and cities, they're going to be called
2 chapters and districts and communities, but that
3 those also be included in the definition because a
4 lot of them, particularly the large land base that
5 have so much area to cover, are starting to incur
6 more local economic development and so you're seeing
7 a lot of commerce and corporations at the more
8 localized levels but they're still owned by tribal
9 governments, just local tribal governments.

10 MS. TANA FITZPATRICK: Thank you.

11 MR. MARK VAN NORMAN: Man, it shows, federal
12 traders' licenses, we're not sure that it's Indian
13 commerce but it's really Indian commerce.

14 I'm Mark Van Norman. I serve as Counsel to the
15 Great Plains Tribal Chairman's Association. And we
16 have our executive director and long-time diplomat
17 for Indian Country, Gay Kingman here, and Joleen
18 Abourezk from Great Plains.

19 We've worked for a long time to say we ought to
20 revamp the Federal Indian Traders' License
21 regulations. And here's why: The Federal Indian
22 Traders' license regulations, statutes and
23 regulations are very important in Indian law because
24 it was the start of the relationship between the
25 United States and Indian nations. The first Federal

1 Traders' License Statutes were actually colonial.
2 And in 1775 they had the Continental Congress act on
3 Federal Traders' licenses prior to the Declaration
4 of Independence.

5 Indian commerce was very important, so in the
6 first treaties -- you have the first treaty, 1778
7 Treaty with the Delaware Nation, it says the United
8 States will secure well-regulated trade with the
9 Delaware Nation. And it should be recognized that
10 that's a bilateral relationship. So those are the
11 early precedents prior to the Constitution.

12 And so in the Articles of Confederation we had
13 kind of a little bit muddled Indian affairs power
14 because it said, you know, the Continental Congress
15 would have authority to treat with tribes and then
16 it said not members of any state. So it was a
17 little confused, and they sought to clarify that in
18 the Constitution to say that there's a clear plenary
19 federal power over Indian affairs and that plenary
20 power should be understood to be vis-a-vis the
21 states because the Constitution is the allocation of
22 power between the United States and the states. So
23 it should be recognized that the commerce clause is
24 referencing Indian tribes as governments and that
25 it's a bilateral relationship.

1 So these trade statutes were, continue to be
2 very important. And if you look at some of the maps
3 about United States territorial acquisition, it's
4 kind of instructive because, you know, part of the
5 Declaration of Independence was saying, Well, we
6 object to the 1763 proclamation that kept the area
7 west of the Appalachians as Indian reserve, and they
8 cite that as an issue. Well, through the
9 Revolutionary War, the United States won a claim
10 versus England for the northwest territory, and
11 trade out there was going to be very important, and
12 so you have probably a very early pronouncement on
13 Indian policy as a Northwest Ordinance of 1787,
14 Upmost good faith shall always be shown towards the
15 Indians and our property and liberty will never be
16 invaded except in just wars and laws will be passed
17 for the benefit of Indians, to protect Indians.

18 Well, you know, you look at those things and
19 those are things that we always rely on in Indian
20 law, but then you see that, Well, what would be the
21 effect of that because that was under the Articles
22 of Confederation. Well, President Washington made
23 sure to get that reenacted in 1789 because that was
24 a very important thing for the new United States
25 because the states had seated their claims in the

1 west of the Federal Government. So the Federal
2 Government was now coming in as the claimant to that
3 land, claiming sovereignty to the land and having to
4 work with Indian tribes because tribes were
5 recognized to have prior rights. And, you know, you
6 have -- the plan of the Northwest Ordinance is for
7 the territorial government and then statehood for
8 five states. And within that framework they're
9 saying, We're going to treat tribes with good faith
10 and we're going to deal justly with tribes on our
11 lands. So Washington got that reenacted in
12 August 1789, and it formed the basis for the plan
13 for territories to become states for the rest of the
14 states.

15 So at the same time they were dealing with the
16 Creek Nation, and the Creek Nation was down south in
17 the area around Georgia. You know, it wasn't clear,
18 you know, what was going to happen down there, and
19 Alabama. And they wanted to conciliate with the
20 Creeks, so they had a trade provision in the first
21 treaty under the Constitution, the 1790 Creek Nation
22 Treaty.

23 And Spain was still in Florida, and Spain was
24 holding Louisiana, Province of Louisiana at that
25 time. You know, England still wasn't clear about

1 the northwest, the whole northwest and Canada. So
2 there were a lot of other international things going
3 on. The United States wanted to secure the trade.

4 So Jefferson comes forward and he has a plan to
5 do trading houses and he wants to have a direct
6 relationship between the United States and Indian
7 nations and oust these foreign citizens, foreign
8 nationals and the foreign countries from the trade.
9 So the trade was very important.

10 I don't think we can really understand, you
11 know, the economic impact from where we're at today,
12 but, you know, you had John Jacob Astor starting his
13 fortune back then. So it was very big. It was very
14 important. These were important pieces of
15 legislation at the start of the country. And so
16 that's reflected in some of the treaties that go
17 forward.

18 So I'm from the Cheyenne River Sioux Tribe and
19 we have, you know, a Treaty of 1815, a treaty with
20 the Teton, and that's readjusting the situation
21 after the 1812 war.

22 But we also have an 1825 treaty and a series of
23 treaties out here, and the O'Fallon treaties, and
24 they are saying that, you know, we ought to have
25 lasting peace and friendship and that we ought to

1 have trade with the United States and the President
2 will designate the places of trade and the tribes
3 for their part will provide protection to the
4 traders and their property.

5 And, you know, I think those treaties should be
6 understood to say they're acknowledging Indian
7 nations as sovereigns because the hallmark of
8 sovereignty is the power of peace and war and if
9 they're settling peace, you know, it implies there
10 could have been war. They're also about regulating
11 commerce and partnership between the United States
12 and Indian nations, and it would be a continuing
13 partnership.

14 So I think when you think about these
15 regulations and bringing them forward in the modern
16 period, it's not only the Federal Indian Trader
17 Statutes, it's also these treaties that provide you
18 background and authority in this area.

19 And the thing that's important to us is that we
20 come through this period, you know, even as they're
21 doing the removal policy, they say in 1834 they're
22 updating the Federal Trader Statutes and in the
23 Senate report it says that, you know, tribes have a
24 right to self-government and it generally extends to
25 persons and activities within their territory, with

1 some exceptions akin to international law, so some
2 of this about citizens of the United States and
3 citizens of Indian nations, but there's always an
4 idea that the tribes retain their original natural
5 rights of self-government.

6 And then as we come forward, you know, we see
7 that the later treaties are 1851, you know, that's
8 laying out the territory of tribes and the United
9 States wants to have free passage across Indian land
10 so that there can be settlement for Oregon. It lays
11 out the tribes' treaties. It recognizes the tribes
12 as sovereigns.

13 You know, we come to the 1868 Treaty, there
14 again very explicitly the United States is saying,
15 We want an end to war. We pledge our honor to keep
16 the peace. And it's very explicit recognition that
17 the Sioux Nation, sovereign authority. And there
18 was a war going on at that time.

19 So one of the provisions that the United States
20 wants to secure through the 1868 Treaty is the idea
21 that the reservation is the permanent home. And so
22 for the Sioux Nation it was western South Dakota
23 from the low water mark on the east bank of the
24 Missouri and took in the Missouri because, you know,
25 we've lived along the rivers in the winters and we

1 went west, you know, following the buffalo during
2 the summers.

3 So that idea of a permanent home is telling our
4 Indian nations that we're going to have a permanent
5 and livable home, so naturally we need commerce;
6 naturally we still, you know, had commerce. I mean,
7 the reason it's Pierre, South Dakota is because it's
8 named after Pierre Chouteau, for an American fur
9 company, and they had Fort Pierre there. And they
10 had other forts there, Fort Lookout along the
11 Missouri River, and they traded with the tribes.
12 And the United States was aware of this. You know,
13 Lewis and Clark say, when they came up the river
14 they say, There's already a trade so that the most
15 distant nations receive goods that are traded from
16 the Mississippi up all the way through the Missouri
17 River valley over to the Pacific Northwest. And
18 there was substantial Native American trade
19 networks.

20 Naturally as we come to the point of the 1868
21 Treaty, the tribes are thinking about how are they
22 going to get jobs. And so they come to the
23 government and they say, "We want our people to be
24 in these posts when you're going to hire people."
25 So that was sort of an initiation of, you know, the

1 federal self-determination policy in terms of
2 contracting, in terms of understanding that tribes
3 were going to be involved in the provision of goods
4 and services under the treaty. Naturally the tribes
5 wanted to continue to maintain their trade and
6 commerce on traditional economies. So the federal
7 traders licenses were important all throughout this
8 time and if you look at the history of it.

9 And then it comes up to the '50s and they kind
10 of fall into disuse. And I started out as a tribal
11 attorney about 30 years ago, and we talked to the
12 BIA superintendent about, "Well, what about the
13 Federal Indian Trader Statutes and how come you're
14 not enforcing them? They enforce them down at
15 Navajo and Hopi and they've updated the regulations
16 for Navajo and Hopi." And they said, "Well, we
17 haven't enforced them up here in the Great Plains
18 because you all are doing your own tribal business
19 licenses so we defer to you as tribes to run your
20 business licenses and there's no need for us to
21 interfere with your situation, that you're taking on
22 this function and that's appropriate in terms of
23 self-government." Well, you know, that's good,
24 except the framework for dealing with the courts is,
25 you know, if you go up to the Supreme Court, you

1 know, you have an hour argument for a case and it's
2 a half hour on each side and you can't really get
3 into, you know, a lot of detail on historical
4 background, so the court sometimes loses sight of
5 what the history is. And the court sometimes has
6 said that, We tread lightly in the face of statutory
7 silence because we have a respect for tribal
8 sovereignty and tribal self-government, and those
9 are some of the Marshall cases. You know, in other
10 areas they say, "Well, the statute is silent so
11 we're going to allow the state to come in and impose
12 a dual tax." And it kind of moves away from looking
13 at the reservation as a permanent home and a
14 homeland with an integral right to self-government,
15 and it kind of strips away our self-government in a
16 way that's contrary to the treaties and statutes.

17 You know, we have the Northwest Ordinance.
18 Well, that was carried forth with different
19 territorial acts. And out here, you know, we had --
20 it's kind of interesting to see the different
21 territories that were extended out here. Even the
22 Wisconsin territory was up to the mid channel of the
23 Missouri River up north. You know, it was Nebraska
24 territory before it was Dakota territory.

25 And when we had the 1851 Treaty it was laying

1 out our territory. In 1854 you have the Kansas/
2 Nebraska Act and they say, "We're going to rigidly
3 adhere to the treaty. We're going to faithfully
4 execute the treaties."

5 When you come forward into the Dakota Act they
6 say the territory is not going to have anything to
7 do with Indian lands; they're going to recognize
8 that Congress still has Indian affairs power in the
9 Territorial Act and they say, We're not going to tax
10 the property of the United States.

11 And going back to the Louisiana Purchase
12 Treaty, you know, Jefferson says, We're going to
13 deal with Indian nations through treaties based on
14 mutual consent. And through all the territorial
15 acts they have to bring it forward that the United
16 States has the authority for the primary disposal of
17 the soil. So in other words it wasn't the states
18 that had the right to dispose of federal property,
19 it was the United States. And the importance of
20 that is the United States was recognizing that
21 Indian nations had prior right and title.

22 So if you watch these statutes coming forward,
23 they kind of provide these principles. And this is
24 reflected in the North and South Dakota Enabling Act
25 that the state has no claim or interest in the lands

1 of Indian tribes or Indians. The state recognizes
2 that Congress has continuing jurisdiction for Indian
3 affairs. The state will not tax the property of the
4 United States, which includes Indian trust property,
5 and the state recognizes that that includes lands
6 that may be acquired in the future for federal
7 purposes.

8 So these are all part of the background. And
9 the traders' statute should be understood, you know,
10 against the treaties and these early statutes that
11 really have this allocation of authority that we
12 already have treaties out here, that these are our
13 permanent homes, that the Federal Government has
14 authority and continuing congressional authority and
15 that it's not the states that are going to come in
16 and be involved in Indian affairs.

17 So the problem that we have is these more
18 modern cases coming forward and not really knowing
19 what to do after the 1924 Citizenship Act. Well,
20 our people out here were involved in securing the
21 1924 Citizenship Act.

22 Henry Standing Bear was one of our leaders from
23 the Oglala Sioux Tribe, and he was active and was
24 pressing for citizenship. And the reason why people
25 were pressing for citizenship was because they kept

1 having these surplus land acts to take land from the
2 tribes when tribes didn't have a right to vote. So
3 Henry Standing Bear says, We want to have
4 citizenship because we want to have a say, you know,
5 in how our people are going to be treated by the
6 United States. But they wanted to reserve their
7 tribal citizenship, so they were not giving up their
8 tribal citizenship at that time.

9 And there's a proviso in the Citizenship Act
10 that says that nothing in the Citizenship Act
11 impairs the right of an Indian to tribal or other
12 property and it will have no impact on that
13 relationship between our tribal citizens and our
14 Indian lands. And the importance of that is that's
15 our homeland. So they were wanting to preserve the
16 status quo for self-government, for our lands as our
17 reserved lands. And out here these are our reserved
18 lands from our original lands, and those are
19 recognized by the treaty in 1851 and carried forward
20 in the 1868 Treaty.

21 Well, you know, we come up and we get into
22 these cases that are what should happen when you
23 have, you know, a logging company at White Mountain
24 Apache and it's Fort Apache Tribal Timber Company
25 and the state wants to impose motor fuel tax on

1 their trucks that are operating on BIA roads and
2 they say, "Well, we're going to have to have a
3 three-part balancing test. We're going to have to
4 have federal and tribal interests balanced against
5 state interests." Well, that turned out good in
6 that case because they preempted the tax and they
7 recognized federal and tribal interests. But the
8 problem with that kind of balancing test is, you
9 know, if you don't say more it's just inherently ad
10 hoc, so it's not real support for Indian
11 self-determination.

12 And the statutes are really, even though
13 they're looked at, like the Indian Reorganization is
14 looked at and the policy is to revitalize Indian
15 economic development and promote self-government,
16 it's not viewed as having enough expressed statement
17 of preemptive force. So in the absence of a clear
18 statement by the United States, the courts are
19 saying, We're going to have this three-part
20 balancing test that you're not going to be able to
21 resolve in terms of economic planning prior to doing
22 anything. I mean, it's kind of a court thing that
23 you have to resolve later on. So it's very
24 unworkable as far as economic development. And it's
25 very unworkable in terms of self-government because

1 the tribes are supposed to retain their original
2 self-government over their permanent homelands.
3 That's protected by treaty.

4 So we're really in a situation where the United
5 States by not saying what the policy is more clearly
6 has allowed encroachment of state authority into
7 tribal homelands that undercuts tribal authority to
8 tax, tribal authority to regulate commerce, and
9 undercuts our treaty rights.

10 So we believe that if you look at the
11 background of the treaties, if you look at the
12 Federal Traders licenses in light of the statutes,
13 that there can be a clear statement that the United
14 States supports Indian self-determination, and that
15 means economic development and self-sufficiency.

16 And we'd like to look at the Reagan policy
17 right now because it seems to be somewhat in line
18 with the current administration's thinking. And the
19 83 statement says they're going to remove obstacles
20 to economic development and that's important to
21 self-sufficiency. Well, one of the reasons why that
22 statement was important, that's the background for
23 Cabazon. That's the background for saying that the
24 tribes did have authority to do gaming. And one of
25 the things that they say in the decision is, "Look,

1 the President told the tribes they have to get out
2 there and generate some economy." And here they're
3 trying to do it. You know, they can't have the
4 state encroaching and frustrating their efforts to
5 develop their economy.

6 So if you guys revamp these traders' license
7 regulations and you have a clear statement that
8 we're out here for self-determination, we're out
9 here for economy, we're out here for economic
10 self-sufficiency and dual state tax burdens
11 frustrate the federal policy so they're preempted
12 and they're preempted because you guys are looking
13 to tribes to have more economic development so that
14 the tribes can do more things and provide more
15 adjunct partnership, you know, in some of our
16 intergovernmental endeavors and when the state comes
17 in and takes that money, it's your primary area
18 because these are reserved Indian homelands. This
19 is part of the bargain of having the rest of the
20 land available to the state.

21 The state agreed to that bargain through the
22 Enabling Acts but here they've forgotten that even
23 though it's in their constitution and they want to
24 come out to Indian lands and exercise authority over
25 Indian lands. And if you say, Well, it's not Indian

1 lands because it's just activities on Indian lands,
2 well, that's kind of somewhat disingenuous from a
3 policy point of view because obviously you hold
4 lands as a homeland to have activities upon those
5 lands.

6 So we're thinking and, you know, we'll provide
7 written comments before you close, but we're
8 thinking that some of the confusion of the Indian
9 case law is based on the idea that the United States
10 has been silent on the question of preemption. And
11 if we can have a clear statement from the President,
12 from the Secretary, and there have been a lot of
13 clear statements but it has to be very clear, that
14 we're here to promote self-determination, we're here
15 to promote economic development, and dual state
16 taxation frustrates the federal purpose, frustrates
17 the federal undertakings, frustrates the treaties.
18 So when you look for authority to do this
19 regulation, you should look for authority to some of
20 the treaties and not just the Federal Traders
21 Statutes because they work hand in hand.

22 You know, I also think that it's important
23 that -- you know, the Supreme Court has looked at
24 tribes in kind of a particular, kind of a silo kind
25 of way; we're each kind of our own silos. They look

1 at our Sioux tribes and they say, "Well, you're not
2 a member of the Standing Rock Sioux Tribe. You're a
3 member of the Cheyenne River Sioux Tribe so you
4 don't have much interest in things at Standing Rock
5 so we're not going to preempt state taxes concerning
6 you working for the tribal government at Standing
7 Rock because you're from Cheyenne River." And it's
8 kind of nonsense because we're all together through
9 the Sioux Nation Treaty and we've always been all
10 together and the United States divided us up through
11 a statute that was intended to take out the middle
12 of the reservation to provide a path from Sioux
13 Falls to Pierre to Rapid City for the railroad, and
14 the railroad got a lot of land afterwards.

15 We're not divided in any way in our thinking.
16 You know, we're at -- at an administrative level we
17 have our own tribal governments on our reservation.
18 We also have provisions calling for a Sioux Nation
19 Council and we frequently meet among the Sioux
20 Nation.

21 So some of these things are kind of, they need
22 to be brought back to the treaty and the original
23 understandings of the Indian nations because they've
24 kind of got caught up in court rhetoric and it looks
25 that way from the Supreme Court but they're only

1 spending a half hour on the case so they don't know.
2 I mean, you go up and listen to some of those cases
3 and you see, "Wow, do things really operate on those
4 Indian reservations." They have no idea. But the
5 Secretary of the Interior does. The Secretary of
6 the Interior is from Montana, you know, out there
7 working with tribes. I understand maybe he was a
8 colleague with somebody from Fort Peck when he was
9 in the navy. You know, he seems to have a good
10 understanding.

11 People that really get involved and the
12 congressional folks that get involved, they have a
13 better understanding that tribes are governments;
14 we're trying to make the most of our homelands and
15 provide a better life for our people, and we need
16 some authority to regulate commerce and to tax
17 commercial activity so that we have, you know, some
18 basis for, you know, our governments.

19 We also need an opportunity for economic
20 development to trade from one reservation to
21 another, so not only between Standing Rock and
22 Cheyenne River but if we have cattle, maybe we can
23 sell them out to, you know, out west to some of the
24 tribes in California that maybe have a lot of
25 hospitality. If we have, you know, some of our

1 tribes doing mineral development, you know, maybe
2 they sell to other tribes.

3 Different tribes can do, provide different
4 goods. We had -- the Sisseton Wahpeton Sioux Tribe
5 was doing garbage bags. And they had a tough time
6 with their garbage bags, and they lost some of their
7 federal contracts. So the other tribes said, "Hey,
8 you know, we can buy from you." And if we do have
9 value that's generated in Indian Country, from your
10 point of view it's not reservation-generated value,
11 it's Indian Country value and it should be
12 recognized in the regs that you're promoting Indian
13 Country economic development for the tribes. And if
14 we can reestablish this kind of original trading
15 network, well that's what tribes did before the
16 United States. You know, if we do it today, that
17 means that some of our tribes that have Indian
18 gaming and have revenues or Indian gaming and are
19 buying \$8 to \$10 million in goods and services can
20 buy some of that, you know, from other tribes. And
21 if there's a little bit of an incentive because our
22 products developed here are not subject to state
23 taxation, they should carry that, you know,
24 preemption of state taxation throughout the Indian
25 Country trade network and that would help facilitate

1 some of these relationships between tribes.

2 So these are, you know, some policy updates
3 that are within your authority because you have very
4 broad authority under Section 2 and Section 9, you
5 know, for Indian affairs. You also have the
6 background of the treaties and you have these
7 Federal Traders licenses that the Supreme Court has
8 said, you know, that the very existence of them
9 preempts state taxation.

10 So we need to do something that's updating
11 these. And if you brought forward some of the
12 provisions like you have for Hopi and Navajo into
13 the other regulations and said, you know, people
14 ought to be suitable; goods ought to be
15 merchantable; there ought to be protection for
16 public health and sanitation, you know, et cetera,
17 there ought to be some enforcement mechanism. And
18 in light of Indian self-determination similar to
19 what they say in Executive Order 13175, we're going
20 to defer to the tribes in the first instance to
21 develop their own laws and standards and regulations
22 for licensing businesses and Indian commerce within
23 their area of Indian Country and we're going to
24 promote them to develop Indian Country value and we
25 don't have to enforce all of our system if the tribe

1 is enforcing their system and the business traders
2 are adhering to it.

3 Now, we get into this kind of situation,
4 non-Indian folks read the news and they read the
5 case law and stuff and they say, "Well, Indian
6 tribes have no jurisdiction to enforce criminal laws
7 in Indian Country so I'm driving across the Pine
8 Ridge Reservation and I'm going to go 85 miles an
9 hour but when the tribal cop stops me I don't want
10 to pay the ticket because you don't have
11 jurisdiction over me." Well, not exactly. I mean,
12 tribes have authority and can enforce that through
13 civil law. You know, we can go through court. We
14 can have a big federal court case go up about
15 whether we have authority to do traffic tickets. We
16 sure as heck are not going to allow somebody to
17 routinely drive through at 85 miles an hour and be
18 scoff laws as far as tickets. So the other thing we
19 can do is next time, you know, the guy comes
20 through, if he wants to go to court and wants to
21 fight the ticket and doesn't want to take the
22 ticket, doesn't want to slow down, you know, we can
23 hold him and we can turn him over to, you know, the
24 next county over, Fall River County and say, Hey,
25 you guys take care of this guy. He's a danger on

1 the roads and he's creating a public danger. So
2 there can be -- it doesn't have to be that the tribe
3 is always going to take every case to the Supreme
4 Court.

5 So if we're doing this business licensing and
6 people are saying, Hey, we're not going to follow
7 your business license because we don't believe in
8 your business license and we're free to do whatever
9 we want on your reservation without reference to
10 you, well then we can refer it and we can refer it
11 to the Secretary and say, This person is not
12 complying with tribal laws and there ought to be
13 federal enforcement, you know, to pick up the slack.
14 And you ought to be working in partnership with us
15 to promote Indian self-determination and economic
16 development and to watch out for things.

17 And that would be kind of the situation that
18 would happen in the grazing situation. You know,
19 generally the Bureau is going to defer to the tribe
20 and allocation of grazing units and, you know, we
21 have all these regulations in place, but ultimately
22 if we have somebody that's trespassing cattle, if
23 somebody is using the wrong brand, if somebody
24 steals cattle, then we're going to get involved with
25 the Federal Government and the Federal Government is

1 going to support the tribe in terms of enforcing
2 that regulatory system.

3 So if we could reinvigorate these Federal
4 Indian traders licenses, they go back to the
5 beginning of the country, maybe even prior to the
6 country, so they're very venerable; they're very
7 closely tied to Congress' Indian commerce power and
8 they give us an opportunity to recognize that the
9 tribes have always been partners with the United
10 States and the trade and that tribal authority is
11 recognized in the treaties; we have our Indian
12 self-determination policy; you recognize our
13 authority as partners.

14 But if the people involved in commerce are
15 doing things, dumping hazardous waste or whatever,
16 then we call upon you and you help us out. And so
17 we could set up that kind of situation. That would
18 really be a benefit to the tribes and it would
19 really restore the original meaning and
20 understanding of these treaties and state-enabling
21 acts and the system the way it's supposed to and
22 give guidance to the courts so that they don't feel
23 that they have to come up with a three-part
24 balancing test that nobody else can figure out
25 either.

1 So we appreciate you coming out. And it's a
2 long way but we've been thinking about this for a
3 little while.

4 Gay, did you want to --

5 MS. A. GAY KINGMAN: I spoke earlier.

6 MR. MARK VAN NORMAN: Oh, you spoke earlier.

7 And I'll just say that our tribes are behind
8 it.

9 Did you speak on behalf of Standing Rock?

10 UNIDENTIFIED SPEAKER: Gary did.

11 MR. MARK VAN NORMAN: And Oglala is interested
12 in this. Cheyenne River is interested in this. The
13 MHA Nation is interested. So everybody will be
14 submitting comments. And we hope you can carry it
15 forward with the new administration because we think
16 it fits in with the idea that regulations ought to
17 be useful. You know, you're streamlining your
18 federal regulations and promoting, you know, the
19 governments that are closer to the people handling
20 their own affairs and promoting Indian
21 self-determination. So I think that's going to be
22 the policy of the administration.

23 And we appreciate your efforts to come out
24 here.

25 MR. JAMES PORTER: Thank you.

1 MR. MARK VAN NORMAN: Thank you.

2 MS. TANA FITZPATRICK: Thank you very much.

3 Okay, so we've been going for about two hours
4 now. I'm going to call for just a five- to
5 ten-minute break and then we can convene with any
6 other comments or close up or however we want to do
7 that.

8 (Recess taken from 10:30 a.m. to 10:55 a.m.)

9 MS. TANA FITZPATRICK: Okay, we'll go ahead and
10 reconvene. I'd like to turn it over to any other
11 comments that we might have. If not, then we can do
12 some closing comments.

13 MS. HEATHER DAWN THOMPSON: Mark raised a
14 couple things I just wanted to build on and support
15 and reiterate. One was the intertribal trade issue.
16 You know, we were talking about generally making
17 sure that commerce going outside your boundaries was
18 covered and protected in this area as well, but I
19 wanted to reiterate the intertribal component of it.
20 This is one of the biggest difficulties. I think
21 all of us are working on projects where we are
22 trying to facilitate the traditional intertribal
23 trade routes. I know that in particular the tribes
24 that I work with are trying to pull together sort of
25 a fish, buffalo, wild rice sort of food trade, and

1 one of the biggest issues is that the states
2 essentially try and seize jurisdiction as soon as
3 you leave the reservation even though you're going
4 directly to another reservation, and so taking sort
5 of that into account, you know, if you're bonded or
6 whatnot, if you're going directly from one
7 reservation to the next or one Indian Country to the
8 next, that that is sort of included in the vision of
9 what intertribal and tribal trade looks like.

10 The second component of it, and this is sort of
11 against my own personal financial best interests,
12 but Indian first, so in my private practice half of
13 my clients of course are tribal but the other half
14 are investors. And Jim and I were visiting a little
15 bit about this during the break.

16 You know, one of the reasons I'm able to live
17 at home and work for my tribes in private practice
18 is because it costs the investor so much to hire
19 attorneys on the other half of my practice because
20 they have to waste so much money hiring us to go
21 through all these different iterations, like Mark
22 was saying, of the different, weighing of the
23 different case law, whether or not different regs
24 are going to be applicable, whether or not different
25 taxes are going to be applicable. And just from a

1 pure business investor standpoint, it's a nightmare.
2 That is how half of us in private practice make our
3 money because they just have to waste it on us in
4 order to try and figure out what it's going to be.

5 And there's so much uncertainty in it. And as
6 you guys know, from a business perspective if
7 something is a higher cost, you can take that into
8 account and you might be able to continue moving
9 forward with your business anyways, but what you
10 can't move forward on business with is uncertainty.
11 You know, is your rent going to be five bucks this
12 month or is it going to be \$500? Is it going to be
13 75 and then 1,500? Is it going to be the state
14 that's regulating who you're paying your taxes to or
15 is it going to be the tribe or are you going to have
16 both? Is this going to change next month? And you
17 just cannot do business in that sort of regulatory
18 and tax environment when the answer to every single
19 question is, "It depends; it depends; it depends."

20 Where is the impetus? Are you starting off or
21 are you coming on? Are you going off or are you
22 going on? Is it on Indian land or trust land? Is
23 it on fee land? I mean, I'm almost embarrassed to
24 have these conversations with non-natives that are
25 not familiar with doing business in Indian Country.

1 They think it's absolutely insane. And it is --
2 this is the single biggest impediment to bringing in
3 our capital and investment partners for Indian
4 Country. And unless we can fix this, nothing else
5 will matter because there's going to be no capital
6 coming in.

7 There's an entire industry of lawyers and an
8 entire industry of consultants for banks that make a
9 ton of money just trying to convince people to do
10 business with Indian Country and help them
11 understand what this patchwork of regulation and
12 taxation looks like that has evolved over like, as
13 Mark was saying, over the last 100, 150 years
14 through the court system because the Federal
15 Government hasn't spoken up and taken this phase
16 over. And so from a pure economic standpoint, we
17 are never going to see that economic development
18 unless we can simplify this and the answer isn't
19 always "It depends."

20 I know it's hard because a lot of the investors
21 aren't necessarily engaged in tribal consultation so
22 we don't always hear that voice. So at RES next
23 week I am going to try to encourage some of the
24 investors, the non-native, non-Indian Country
25 investors to file some comments as well. But as a

1 person that gets hired by them all the time, I can
2 easily tell you this is by far their biggest
3 expense, the biggest impediment. And seven times
4 out of ten the decision after going through "This
5 depends," you know, the diagram thing, is that they
6 just don't do business because there's too much
7 uncertainty and it's too expensive with all of the
8 different taxation and regulatory framework involved
9 with that. So I just wanted to add that.

10 Thank you.

11 MS. TANA FITZPATRICK: Thank you.

12 Any other comments?

13 MR. JAMES PORTER: Anybody else?

14 (No response)

15 MR. JAMES PORTER: No? Okay.

16 MR. MARK VAN NORMAN: Well, Heather came back
17 for a second bite of the apple so I thought I
18 would.

19 MS. HEATHER DAWN THOMPSON: That was my fourth
20 or fifth actually.

21 MR. MARK VAN NORMAN: You know, in our area we
22 really have a feeling that we're standing on the
23 treaties, that our leaders and our grandfathers and
24 our relatives when the United States came out in
25 their time, you know, were the parties to the

1 treaties and that we carry forward, you know, their
2 legacy by defending the treaties. And I think
3 there's kind of -- you know, it's kind of funny,
4 there's a continuity. It seems like a long time
5 when you're talking about years. And if you talk
6 about -- boy, if you talk about 1960 and the Cuban
7 missile crisis, I mean I guess that's kind of
8 current history, but if you talk about --

9 MR. JAMES PORTER: No, it's not.

10 MR. MARK VAN NORMAN: Maybe not. It was the
11 year before I was born.

12 But if you talk about 1860, you know, it seems
13 like another whole universe. But my mom was --
14 she's 84. She didn't live with me when I was dating
15 my wife fortunately, but she does now. She has kind
16 of a different outlook on time because she's 84.
17 And she took care of her grandmother when she was a
18 girl in high school, and her grandmother was her
19 grandfather's second wife, and so he was a little
20 bit older. He was born in 1860. So my mother's
21 grandfather was born in 1860. So his dad was a
22 French and Cree Indian fur trader with the American
23 fur company (unintelligible), and he testified
24 against the Homestead Act in 1860 because he said,
25 "Hey, these are Indian lands out here. You can't

1 have people coming out here and homesteading these
2 lands, you know, because we have treaty rights that
3 are recognized under the 1851 Treaty," right? So
4 people for a long time have been engaged.

5 And, you know, we have these problems with
6 these surplus land cases, and we have a whole lot of
7 these surplus land cases. And we've had our people
8 like from Cheyenne River went out to Congress in
9 1904 and said, "Don't pass an opening act for
10 Cheyenne River because we're not ready to open our
11 lands for settlement." So we didn't have the 1904
12 Surplus Land Act.

13 And the 1908 Act was a different kind of act
14 because in the 1904 Act the United States came out
15 and they said for a sum certain we're going to buy
16 this land. Well, in 1908 they didn't want to do
17 that anymore because the land was not really selling
18 all that well, as well as they thought for
19 settlement because, you know, the land out here is
20 not as productive as it is back east.

21 So they came out and they did a different
22 statute in 1908 and it was people, when they bought
23 a particular tract, then the tribe -- that would go
24 to the United States and then the tribe would get
25 paid on a tract-by-tract basis. So we kept our

1 reservation boundaries in the Solem vs. Bartlett
2 diminishment case, and the court said the 1908
3 statute was different than the 1904 statute.

4 So this history of people being involved, you
5 know, goes back a long way, and that's why we're
6 very interested in the historical. And I think
7 today we have the president of the Oglala Sioux
8 Tribe going over to the national archives to view
9 the 1851 and 1868 treaties.

10 So probably a little bit like the Navajo Nation
11 like some of our other, you know, western nations,
12 we're still feeling very strongly because that the
13 treaties are the law of the land. And there's a lot
14 of these statutes that went along that recognized
15 the treaties.

16 And, you know, you have to think the Kansas/
17 Nebraska Act, you know, faithfully execute, rigidly
18 adhere to the treaties. You know, even in 1871 and
19 the treating making.

20 In 1889 when we have not only the State
21 Enabling Act but we have an act of March 2nd, 1889
22 that divided the Great Sioux Reservation, but it
23 retains the part of the treaty that's not amended by
24 the act. So the treaty is carried forward by the
25 act.

1 So even in reference to the Indian
2 Re-Organization Act, you know, we had a provision in
3 the 1889 Act that said we were going to have a wagon
4 and a, was it -- is it a horse? I'm not -- ox and
5 farm implements and whatnot for each person as they
6 come of age. And that was carried forward. So as
7 they -- even though they ended allotment, they
8 didn't end the sort of agricultural benefit that was
9 coming, and they called it a Sioux benefit.

10 So the tribes have worked hard. When we did
11 the Cheyenne River Oahe Act, the tribe said, "Hey,
12 we're going to have to have a vote on this and we're
13 going to have to have three-quarters consent to this
14 act because we can't see our treaty lands without
15 three-quarters consent." And Congress agreed.

16 So out here we stand on the treaties. And the
17 treaties are good law, not only as far as we're
18 concerned but also as far as federal law. So I
19 think when you do this, if you're able to do this
20 amendment to the federal traders statutes, it's
21 important to look at these treaty provisions.

22 And these treaties have never been aggregated.
23 You know, that we're carrying forward these treaty
24 provisions.

25 And there's trade provisions in the treaties

1 that can also be relied on to provide a little bit
2 more framework so that when you do have the
3 partnership with the tribes under the
4 Self-Determination Act you're not looking to the
5 provision that says, The commissioner shall have the
6 sole power to appoint Indian traders; you're looking
7 to the broader perspective that the tribes are the
8 partners in trade.

9 And so under self-determination we're
10 effectuating the treaties by relying on our partners
11 to carry out that business in the first instance.
12 And I think that gives you more background when you
13 talk to lawyers over at DOJ who are not versed in
14 Indian affairs.

15 So I'm sort of having a feeling that there's
16 that kind of dialogue a little bit behind this so it
17 makes it more difficult to undertake for you. But I
18 think if they look at more of the historical
19 materials that they'll see that there's good support
20 for your effort.

21 So we appreciate all of your hard work and
22 traveling the country to get out here and meet with
23 us all.

24 So thanks very much.

25 MS. TANA FITZPATRICK: Thank you.

1 MS. A. GAY KINGMAN: Can you tell us what your
2 plans are? I know the next place is Shakopee, but
3 what's the outline after that, the schedule? Will
4 it be posted on the federal -- on your website?

5 MS. TANA FITZPATRICK: The -- so actually we're
6 going to RES on Monday. And then Tuesday is Prior
7 Lake. And then next Thursday is the last
8 consultation at Seneca, New York.

9 And all of the notes from the consultations are
10 posted on line. And at this point we're -- we don't
11 have a plan about what's going to happen once we
12 receive all of the comments, but those comments are
13 due on April 10th. And so we'll be taking a look at
14 those.

15 As you all know -- maybe you don't know, but
16 Secretary Zinke was just confirmed last week, and so
17 a lot of the priorities are going to start coming
18 forward for Interior and also for Indian Country out
19 of Interior. So we'll see.

20 MR. JAMES PORTER: I'm sure you were hoping for
21 more of an answer than that, and it's just that's
22 where we are now. This is the initial.

23 This has been a great meeting. It's really
24 helpful to hear how important these issues are
25 because the meetings that I had been to before this

1 hadn't made that clear at all.

2 MS. TANA FITZPATRICK: Any other comments?

3 (No response)

4 MS. TANA FITZPATRICK: Well, if there are no
5 other comments, then I just want to echo what Jim
6 just said that this has been a very helpful
7 consultation. We've seen a lot of great input. And
8 I'm personally but also the Department is looking
9 forward to the comments that we'll receive by
10 April 10th. That will definitely help inform, if
11 the Department does move forward with a regulation,
12 how that will look like in incorporating those
13 comments into any formulation of regulation.

14 And so thank you all for having us. And that's
15 it.

16 * * * * *

17 (The proceedings concluded at 11:15 a.m.,
18 March 9, 2017.)

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1 STATE OF SOUTH DAKOTA)
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 2 COUNTY OF PENNINGTON)

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I, CINDY K. PFINGSTON, hereby certify that the foregoing pages numbered from 1 to 86, inclusive, constitute a full, true and accurate record of the proceedings had in the above matter, all done to the best of my skill and ability.

DATED this 10th day of April, 2017.

CINDY K. PFINGSTON
 Registered Professional Reporter

My commission expires:
 February 4, 2022

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